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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION, *Appellant*

v.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM, and THE NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY, *Appellees*

Appeal from the United States District Court for the District of Massachusetts

REPLY BRIEF OF PAN-ATLANTIC STEAMSHIP CORPORATION, APPELLANT

DAVID G. MACDONALD
RUSSELL S. BERNHARD
504 Commonwealth Building
Washington 6, D. C.
Attorneys for Appellant Pan-Atlantic Steamship Corporation

Of Counsel:
MACLEAY, LYNCH & MACDONALD
Washington, D. C.
WILLIAM H. ARMBRECHT, JR.
Mobile, Alabama
WARREN PRICE, JR.
Washington, D. C.
JAMES JULIAN WEINSTEIN
Boston, Massachusetts

TABLE OF CONTENTS

Page

I. Section 9(b) of the Administrative Procedure Act Does Not Require That the Expiring License and the License Applied for Be Identical in Form ... 3

A. The Record Does Not Support the Conclusion That Congress Intended Section 9(b) To Be Construed As If It Contained the Words "License of the Same Type or Class" as Found in the Ohio Statute 3

B. Even Assuming, Arguendo, That Section 9(b) Was Intended by Congress To Be Interpreted As If It Contained the Wording of the Ohio Statute, It Does Not Follow That the Licenses Involved in This Case Are Not "of the Same Type or Class" Within the Meaning of the Ohio Statute 5

II. The Construction of Section 9(b) Advocated by Appellants Is Consistent With the Basic Legislative Purpose Underlying the Interstate Commerce Act 9

III. Appellees Err in Certain of Their Factual Assertions 13

A. The Appellee-Railroads Err in Asserting That All of the Present Temporary Operation Is Not Covered by the Application for the New Permanent License 13

B. The Appellees Err in Asserting That the Commission's Rules Are Inconsistent With the Commission's Construction of Section 9(b) .. 14

C. The Department of Justice Errs in Contending That 180 Days Is an Adequate Period Within Which the Commission Can Complete License Application Proceedings 14

Proof of Service 16

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The opinion of the District Court in the case under appeal (144 F. Supp. 53) recited no reasons in support of the judgment for the plaintiffs (appellees) other than that, under the rule of *stare decisis*, the

decision in this case was governed by the decision of the same Court in *Stone's Express, Inc.* v. *United States*, 122 F. Supp. 955. In our opening brief before this Court, we addressed ourselves to the two grounds upon which the District Court based its decision in the *Stone's Express Case:* first, that section 9(b) of the Administrative Procedure Act requires, as a condition precedent to its applicability, that the applicant for a new or renewal license be a license holder at the time the application for the new or renewal license is filed; and second, that the license extension provision of section 9(b) is inconsistent with the 180 day licensing limitation in section 210a(b) of the Interstate Commerce Act, and that section 9(b) cannot be construed as amending section 210a(b) by implication.

The appellees, in their briefs, have raised two new issues, neither of which was considered by the District Court in the *Stone's Express Case,* nor presumably, by the District Court in this case: first, whether section 9(b) acts to extend the expiration date of a license only when the application filed by the licensee is for a new or renewal license of the "same type or class"; and second, whether the construction of section 9(b) urged by the appellants is contrary to the legislative purpose of the certificate provisions of the Interstate Commerce Act.

This reply brief is limited to these two new issues, and to the rebutting of certain contentions in appellees' briefs, which appellant believes to be factually erroneous.

I. SECTION 9(b) OF THE ADMINISTRATIVE PROCEDURE ACT DOES NOT REQUIRE THAT THE EXPIRING LICENSE AND THE LICENSE APPLIED FOR BE IDENTICAL IN FORM

A. The Record Does Not Support the Conclusion That Congress Intended Section 9(b) to be Construed as if It Contained the Words "License of the Same Type or Class" as Found in the Ohio Statute

The Senate Judiciary Committee Print, June 1945, of the Administrative Procedure Act, after explaining the purpose of section 9(b), stated (Page 35, Senate Doc. No. 248, 79th Cong. 2d Sess.):

> "A similar provision is contained in the licensing procedure act of the State of Ohio."

The "similar provision", to which reference was made, is found in Vol. 120, p. 361, Laws of Ohio (1943-44), and reads as follows:

> "No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a new license *of the same type or class,* or renewal of an existing license, or application for registration, prior to the expiration of the license held by said licensee at the time said application was made and where said application was filed with the agency within the time and manner provided by statute or rule of the agency." (Emphasis added.)

Nowhere in the legislative history of the Administrative Procedure Act is there even a suggestion that Congress had received any information or explanation concerning the background, interpretation, or application of the Ohio statute. The record indicates that the Senate Judiciary Committee based its reference to the "similarity" of the two statutes solely upon the

bare language of the Ohio statute. Nevertheless, the appellees have seized upon this passing comment of the Committee and from it have endeavored to draw the inference that Congress intended section 9(b) to be construed as if it had been written *verbatim* in the form of the Ohio statute. On the basis of this assumed Congressional intent, the appellees construe section 9(b) as extending an expiring license only when the new license applied for is "of the same type or class" as the expiring license. The appellees then examine the two licenses involved in this case, and on the basis of criteria which they alone establish, they conclude that the licenses are not "of the same type and class" and therefore are not within the scope of section 9(b).

The logic by which the appellees have reached these results is both strained and unnatural. Their conclusion that section 9(b) must be construed as if it were written in the language of the Ohio statute completely ignores the fact that Congress, having before it the precise language of the Ohio Statute, deliberately chose to draft section 9(b) using quite different language. The reasonable and natural inference to be drawn from this difference in the language used is that Congress intended section 9(b) to accomplish a result somewhat different from that of the Ohio statute rather than the identical result. The two statutes are unquestionably "similar", as the Senate Committee stated, but similarity and identity are not one and the same. The Ohio statute is addressed to the *form* of the licenses involved and imposes a condition that an existing license will be extended only if the license applied for is "of the same type or class"; section 9(b) on the other hand, looks not to the form of the licenses but to the *activity* to which they apply, and

the condition imposed by section 9(b) is not that the licenses must be of the same class and type but that they must apply to the same *activity*, which must be an activity of a *continuing* nature. If, as we suggest, these differences in the language of the two statutes are the result of deliberate action on the part of Congress, and there is no reason to believe otherwise, then the clear and obvious intent of the plain language of section 9(b) is that an existing license applicable to an activity of a continuing nature will be perpetuated until the application for a new license to continue that activity has been acted upon by the Agency, irrespective of whether the forms and durations of those licenses are the same or different.

B. Even Assuming, Arguendo, That Section 9(b) Was Intended by Congress to be Interpreted as if It Contained the Wording of the Ohio Statute, It Does Not Follow That the Licenses Involved in This Case Are Not "of the Same Type or Class" Within the meaning of the Ohio Statute

The appellees contend that a "temporary license" is not of the same type or class as a "permanent licensed," and, therefore, section 9(b) construed in the light of the Ohio statute, cannot have been intended to apply to such licenses even though they may be applicable to the same continuing activity. The legislative history of section 9(b) appears to deny the validity of appellees' contention. The Congressional Committee expressly considered whether both temporary and permanent licenses were within the scope of section 9(b). As quoted at pages 13 and 14 of our opening brief, the Committees of both Houses pointed out in their reports that the *second* sentence of section 9(b) was not intended to apply to temporary licenses; and the Attorney General, in his

comments on section 9(b), requested by those Committees, specifically adverted to a situation such as presented in this case, where a temporary license would be issued pending the determination of an application for a permanent license. He also stated that the *second* sentence of section 9(b) would not apply to such a situation. Both Committees and the Attorney General, by these comments, were making clear the fact that a temporary license, effective during the pendency of a permanent license application applicable to the same continuing activity, could be terminated forthwith by the agency at the conclusion of the proceeding for the permanent license, without the necessity of following the revocation procedure provided for in the second sentence of section 9(b). Congress did not, however, negative the application of the first sentence of section 9(b) to temporary licenses; and we therefore presume that Congress intended that an applicant for a temporary license, as well as an applicant for a permanent one, is entitled to have his application heard with reasonable dispatch, as required by the first sentence. Likewise, Congress did not negative the application of the third sentence of section 9(b) to expiring temporary licenses applicable to activities of a continuing nature; and we believe that, under a logically consistent interpretation of the entire section, Congress intended that an expiring temporary license would be extended while a proceeding for a new license applicable to the same continuing activity is pending, irrespective of whether the proposed new license is to be a temporary or permanent one.

Even apart from the foregoing legislative history indicating a Congressional intent to cover both tem-

porary and permanent licenses under the third sentence of section 9(b), and still continuing with our assumption, *arguendo,* that Congress did intend section 9(b) to apply only to situations where the expiring license and the requested license are "of the same type or class", as those words were used in the Ohio statute, it does not necessarily or even reasonably follow, as appellees suggest, that section 9(b) would not apply in this case.

Nothing in the record of this case, nor in the legislative history of section 9(b), discloses what the Ohio legislature intended by the words "license of the same type or class". The appellees base their entire argument concerning this point on what they regard as a possible basis that could have been used in Ohio in construing these words. The appellees in their briefs suggest the following items as bases for distinguishing between "types" or "classes" of licenses: (1) the duration of the license, i.e., whether permanent or for a fixed period; (b) the nature of the proceeding by which the licenses are issued, i.e., whether pursuant to adversary public hearing procedure or pursuant to application, written representations, and agency action; and (c) the findings which must be made as a prerequisite to the issuance of the licenses, i.e., whether required by the public convenience and necessity, or the public interest, or some other criteria.

These bases of distinction suggested by the appellees are, of course, highly esoteric, and would not ordinarily come to mind when reading the words "license of the same type or class". Appellees have failed to mention the one obvious basis for establishing whether licenses are of the "same type of class", which basis quite likely could have been the actual

intent of the Ohio legislature, namely, the activities for which the licenses are issued. The Ohio statute is concerned with a license applicable to a "business or profession" and provides that the license applicable to that "business or profession" shall not expire while an application for a "new license of the same type or class" is pending. We believe the obvious and sensible interpretation of the words "license of the same type or class" would be "license applicable to the same type or class of business or profession". For example, a dentist's license will not expire while his applica- for a new dental license is pending; but if his new license application is for the practice of medicine the expiring dental license would not be perpetuated in the interim. Or if a man held a license to operate as a drugstore and desired to convert his place of business into a restaurant, the expiration of the drug store license would not be postponed pending determination of his application for a restaurant license.

The appellee-railroads point out at page 10 of their brief that the Ohio statute in question was amended in 1945, only two years after its enactment. The ambiguous words "license of the same type or class" were deleted, and the new wording now refers simply to "licensed business or profession", which amendment is consistent with the interpretation we suggest here.

If Congress did intent that section 9(b) follow the meaning of the Ohio statute, then under the interpretation we suggest, the permanent license for which Pan-Atlantic applied is "of the same type" as Pan-Atlantic's temporary license, since both cover the same business operation—common carrier water transportation service between ports on the east and west

coasts of the United States via the Panama Canal; and section 9(b) would therefore be applicable to this case.

II. THE CONSTRUCTION OF SECTION 9(b) ADVOCATED BY APPELLANTS IS CONSISTENT WITH THE BASIC LEGISLATIVE PURPOSE UNDERLYING THE INTERSTATE COMMERCE ACT

The Department of Justice argues that the application of the third sentence of section 9(b) to temporary licenses issued under section 311(a) would defeat the legislative purpose of the certificate provisions of the Act. The Department of Justice argues that the certificate provisions are intended to prevent an oversupply of transporation and to afford protection to existing certificate holders through hearing requirements and standards of public convenience and necessity, which must be met before a new licensee may commence operation. The Department insists that temporary licenses are issued ex parte and without the necessity of establishing that service is required by the public convenience and necessity, thus jeopardizing the rights of existing license holders.

While it is quite true that the certificate provisions of the Act are intended to prevent an over-supply of transportation services to the detriment of the national transportation system, and the due process provisions of the Act are designed to protect existing license holders, it is our position that the temporary licenses issued pursuant to sections 210a and 311(a) of the Act are not in derogation of these statutory purposes, and, furthermore, such temporary licenses are issued in response to other and even more fundamental legislative purposes stated in the Act.

The National Transportation Policy (49 U.S.C. prec-sec. 1) declares that the entire regulatory scheme provided by the Interstate Commerce Act has been established, and must be interpreted and applied, with the following objectives in mind:

> ". . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

Consistent with this declaration of Congressional policy, the Commission has the duty of providing an adequate supply of all types of transportation services, sufficient to meet the needs of the shipping public. Under ordinary condition , the regulatory scheme provides for the issuance of certificates authorizing the performance of transportation services; and such certificates are issued pursuant to procedural due process requirements which include notice to existing license holders of the pending application and an opportunity for such license holders to express their views to the Commission with respect thereto. In addition, the applicants are usually required to establish that the public convenience and necessity require the proposed service. Congress, however, also has recognized the fact that, under certain circumstances, an immediate and urgent need for transportation services required by the public may arise where there is no licensed carrier available to render such service. The temporary licensing provisions in sections 210a and 311(a) of the Act were established by Congress for the express purpose of affording the Commission a means of promptly filling such public

needs. While it is true that the temporary licenses are issued without a public hearing, the Department of Justice errs in stating that the proceeding is ex parte, and that there are no safeguards for existing license holders. The proceedings are not ex parte. Before acting upon an application for a temporary license, the Commission provides notice to licensed carriers of such pending application, and it affords such licensed carriers an opportunity to present their views with respect to the application. In this case, the railroad appellees received such notice of the application of Pan-Atlantic for a temporary license and they did submit their views to the Commission with respect thereto prior to any action being taken by the Commission. Moreover, the temporary licensing provisions of the Act, section 210a and 311(a), actually demand that the applicant meet a higher substantive standard of proof than is required to obtain a certificate. The temporary licensing requirement is that the applicant must establish "an immediate and urgent need to a point or points, or within a territory, having no carrier service capable of meeting such need"; the certificate requirements are only that the applicant must establish that the proposed service "is or will be required by a present or future public convenience or necessity" (sec. 309). Thus, existing licensed carriers actually receive greater safeguards under the temporary licensing requirements than they do under the certificate requirements.

The basic issue raised by this case is whether the shipping public, in response to whose urgent and immediate needs the temporary service was established, should be deprived of that service at the end of 180 days, simply because the administrative agency has

not yet completed the proceeding which will determine whether the carrier providing that service may continue to do so under a new license. The appellees argue that Congress was willing to entrust the temporary licensing powers to the Commission only for a period of 180 days, and beyond that time the paramount consideration is protection of existing license holders rather than continuance of a needed public service. In our opinion, this argument is completely without merit. If at the beginning of the 180 day period no existing licensed carrier was capable of providing the urgently needed service, it is difficult to see how, at the end of the 180 day period, any such licensed carrier can claim that a continuation of that service under the temporary license until completion of the pending certificate proceeding will cause such carrier a serious injury because of diversion of traffic from it. In balancing the respective interests involved in this case, certainly the injury to the public of discontinuing the needed water carrier service, together with the injury to Pan-Atlantic resulting from suspension of that service until completion of the pending certificate proceeding, greatly outweigh any injury the protesting rail carriers might sustain as the result of the alleged possible diversion of traffic from such rail carriers during the pendency of that certificate proceeding. This is the type of problem that Congress was considering when it enacted section 9(b) of the Administrative Procedure Act, and there probably is no situation in more critical need of relief offered by section 9(b) than that presented in the instant case. It is hard to conceive that Congress intended to make the temporary licensing provisions of the Interstate Commerce Commission completely exempt from the operation of section 9(b), when the

Commission is well-known to be one of the most active of the Federal licensing agencies, and when Congress expressly stated that it was *not* making any exceptions under the Administrative Procedure Act for the Commission (see quotations pp. 33-35 of our opening brief).

III. APPELLEES ERR IN CERTAIN OF THEIR FACTUAL ASSERTIONS

A. The Appellee-Railroads Err in Asserting That All of the Present Temporary Operation Is Not Covered by the Application for the New Permanent License

At pages 26 and 27 of appellee-railroads' brief, a point is made that Miami as a port of destination is contained within the scope of the temporary authority but not within the scope of the application for permanent authority. This is erroneous. The permanent license application before the Commission does include Miami as a port of origin and destination. Appellees, in their original complaint in this case inadvertently omitted Miami in the list of many cities covered by the application. Pan-Atlantic, in its answer did not catch this error; and appellees, in their zealous efforts to create distinctions where none in fact exist have brought forward this typographical error which originated in their complaint. Their entire point is without any validity.

The appellees also suggest as a reason for not applying section 9(b) to Pan-Atlantic's temporary license, the fact that the application for a permanent license is broader in scope than the temporary license. The entire activity being performed under the temporary license will be continued under the permanent license, hence the temporary license does apply to a continuing activity, which is all that is required by section 9(b). Appellees suggest that, if section 9(b) is con-

strued by this Court as being applicable to temporary licenses issued by the Interstate Commerce Act, abuses can occur if applicants apply for new licenses far more extensive than the temporary licenses which they hold. This is a matter which is wholly within the control of the Commission both as to its dockets and its rule-making procedures.

B. The Appellees Err in Asserting That the Commission's Rules Are Inconsistent With the Commission's Construction of Section 9(b)

The appellee-railroads assert at page 37 of their brief that the Commission's rule preserving to the Commission the right to terminate at any time, "in accordance with law", any temporary authority or extension thereof under section 9(b) is inconsistent with our suggested interpretation of section 9(b). With this we do not agree. There are lawful occasions when the Commission may cancel a temporary authority extended by operation of law under section 9(b). Examples of such situations would be (a) where the licensee discontinues operations voluntarily, so that the operation no longer is one of a continuing nature; (b) where the licensee withdraws or discontinues prosecution of the application for a new license; and (c) where the licensee engages in wilful violations of the Act.

C. The Department of Justice Errs in Contending That 180 Days Is an Adequate Period Within Which the Commission Can Complete License Application Proceedings

The short and simple answer to this contention is that the very steps of procedural due process, which the Department has enumerated as being available to existing license holders in certificated proceedings, are precisely the reason why a certificate proceeding

cannot today be completed within 180 days, unless the application is uncontested. Protesting carriers, such as the railroads in this proceeding, may under the Commission's procedural rules use up approximately 160 days of the total 180 days solely on their own behalf. Obviously the Commission, the Examiner, and the applicant cannot complete their functions in only 20 days. The crowded docket of the Commission is itself the demonstration that the protestants and interveners, as well as the applicants, cannot complete certificate proceedings today in 180 days. Congress itself realized this fact in 1946, and that is why section 9(b) was enacted.

WHEREFORE, the appellant, Pan-Atlantic Steamship Corporation, respectfully prays that this Court reverse the judgment of the District Court and remand this case to the District Court with instructions to enter judgment for the appellant.

Respectfully submitted,

DAVID G. MACDONALD
RUSSELL S. BERNHARD
Attorneys for Appellant
Pan-Atlantic Steamship
Corporation

Of Counsel:

MACLEAY, LYNCH & MACDONALD
WILLIAM H. ARMBRECHT, JR.
WARREN PRICE, JR.
JAMES JULIAN WEINSTEIN

April 22, 1957

Proof of Service

I, Russell S. Bernhard, one of the attorneys for Pan-Atlantic Steamship Corporation, appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of April, 1957, I served copies of the foregoing document on the counsel for the several parties to this proceeding, by mailing a copy in a duly addressed envelope, by air mail, postage prepaid, to each of the following outside Washington, D. C., and by first-class mail, postage prepaid, to each of the following in Washington, D. C.

Representing the Appellees:

1. W. Q. Keenan, Esquire
   Assistant Commerce Counsel
   New York, New Haven and Hartford
   Railroad Company
   New Haven 6, Connecticut

2. Edmund M. Sweeney, Esquire
   Room 532 South Station
   Boston 10, Massachusetts

Representing the United States:

3. Honorable J. Lee Rankin
   The Solicitor General of the United States
   Department of Justice
   Washington 25, D. C.

4. Victor R. Hansen, Esquire
   Assistant Attorney General,
   Department of Justice
   Washington 25, D. C.

5. Charles H. Weston, Esquire
   Department of Justice
   Washington 25, D. C.

6. Anthony Julian, Esquire
United States Attorney
Devonshire and Water Streets
Boston, Massachusetts

Representing the appellant, Interstate Commerce Commission, in the companion case, No. 424:

7. Robert W. Ginnane, Esquire
General Counsel
Interstate Commerce Commission
Washington 25, D.C.

8. James A. Murray, Esquire
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

RUSSELL S. BERNHARD